

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Commission Seeks Comment on Disposition)	
of Down Payments and Pending applications)	
for Licenses Won during Auction No. 35 For)	WT Docket No. 02-276
Spectrum Formerly Licensed to NextWave)	
Personal Communications Inc., NextWave)	
Power Partners, Ind. and Urban Comm --)	
North Carolina, Inc.)	

To: The Commission

COMMENTS

Cook Inlet/VS GSM V PCS, LLC ("Cook Inlet")¹ supports the Commission's proposal to allow each Auction No. 35 bidder either to dismiss its pending application and all associated auction obligations or to reaffirm its commitment to the auction results. Specifically, Cook Inlet supports a proposal that would allow auction winners to request dismissal of their pending applications and receive full refunds of their remaining deposits held by the Commission. Any auction winner that chooses to dismiss its application must be relieved of all obligations related to Auction No. 35 and no penalty or restriction on reacquiring the same spectrum in the future should be imposed. This outcome is reasonable and justified because the Commission does not have the ability to grant the licenses previously issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and presumably Urban Comm-

¹ Cook Inlet is controlled by Cook Inlet Region, Inc., which is an Alaska Native Regional Corporation organized under the Alaska Native Claims Settlement Act. *See* 43 U.S.C. §§ 1601 *et seq.* Cook Inlet was the high bidder on twenty-two licenses in Auction No. 35. The Commission has determined that Cook Inlet is a qualified licensee for licenses won in Auction No. 35 when it partially granted Cook Inlet's application and awarded Cook Inlet a single license for Saginaw, Michigan, on August 22, 2001.

North Carolina, Inc. (“Urban Comm”).² Relief is further justified because the negative impact of the delay in receiving these licenses is exacerbated by the economic crisis facing the telecommunications industry. The Commission should expeditiously implement this proposal, which will provide certainty to the auction winners and enable them to move forward with their business plans.³ If and when the Commission is in a position to reactuate Auction No. 35 spectrum, Cook Inlet urges the Commission to ensure that small businesses have a continuing opportunity to participate in the auction process.

I. THE COMMISSION SEEKS COMMENT ON WHETHER CHANGES IN THE TELECOMMUNICATIONS INDUSTRY JUSTIFY RELIEF FROM THE AUCTION NO. 35 OBLIGATIONS, BUT THE REAL ISSUE IS THE COMMISSION’S INABILITY TO AWARD THE LICENSES THAT WERE AUCTIONED ALMOST TWO YEARS AGO.

The Commission has requested comment on whether the changes in the telecommunications sector justify relieving the winners from their remaining obligations from Auction No. 35. While the economic changes since the end of the auction have indeed had a significant impact on the winning bidders, the real focus of attention should be on the fact that the Commission remains unable to award the spectrum bid for in Auction No. 35, and the prospect that these licenses can be granted in the near future remains unlikely.

The dramatic downturn in the telecommunications industry has far exceeded the problems of the broader economy. The industry has suffered a record-breaking number of

² The Commission has not made clear how it intends to treat the Urban Comm licenses. Because Urban Comm’s licenses are subject to similar uncertainties and delays, similar relief as is requested with respect to the NextWave licenses would appear to be appropriate.

³ The Commission sought comment on an alternative “selective opt-out for pending applications” proposal. At this time, Cook Inlet does not request the flexibility offered by this proposal. After reviewing the comments filed by other parties in this proceeding, Cook Inlet may submit additional comments on this option.

bankruptcies, the loss of more than 500,000 jobs, and a market value decline of \$2 trillion.⁴ Since the Commission issued its Partial Refund Order in March 2002, “the state of the capital markets...has continued to decline rapidly.”⁵ While other industries are showing signs of recovery, telecommunications has not.⁶ Limited access to capital has significantly restricted telecommunications business planning, capital expenditures, and the deployment of new services. For example, the wireless sector has invested billions of dollars in digital 2G networks which have yet to generate a positive return.⁷ Now, carriers have dramatically curtailed plans to invest in 2.5G and 3G networks and to implement mobile data services, in large part because of limited access to capital and the inability of these services to generate positive free cash flow in the near-term.⁸ Looking forward, the restrictions on access to capital markets and the resulting inability to fund current and future business plans will continue to hurt the future of this sector.⁹

As the Commission has recognized, the economic downturn has exacerbated the negative impact on winning bidders of the outstanding Auction No. 35 obligations. Because of their combined outstanding commitments to pay billions of dollars for spectrum licenses, the high bidders in Auction No. 35 now are unable to utilize precious capital resources to maintain current

⁴ See Christopher Stern, *Telecom Slump Continues; Lucent, French Firm Report Setbacks*, WASH. POST, September 14, 2002, at E01; see also Remarks of Michael K. Powell, Chairman, Federal Communications Commission, Goldman Sachs Communicopia XI Conference, (Oct. 2, 2002).

⁵ Refund Public Notice at 3.

⁶ See Christopher Stern, *Telecom Slump Continues; Lucent, French Firm Report Setbacks*, WASH. POST, September 14, 2002, at E01 and Karen Kaplan, *Telecom Slump Gets Deeper Amid New Layoffs, Cutbacks*, LA TIMES, April 23, 2002, at A1.

⁷ See Statement of Robert Konefal, Managing Director for Moody’s Investors Service, FCC En Banc Hearing On Steps Toward Recovery in the Telecommunications Industry (Oct. 7, 2002) (stating that the outlook for the next twelve to eighteen months is negative for all segments of the telecommunications industry).

⁸ See *id.*

⁹ See *id.*

operations, improve the coverage and quality of their networks, alleviate capacity constraints, and otherwise develop their businesses in ways that promote the economy, sustain employment, and serve consumers. In light of the economic downturn, the delay in the resolution of the auction further restricts available capital. These capital restrictions create a substantial hardship for the Auction No. 35 winners, especially small businesses.

While the desperate economic conditions plaguing the industry and the impact of the potential, ongoing Auction No. 35 commitments on the winning bidders should be significant issues for the Commission, the bottom line is that the Commission still does not have, and is not expected in the foreseeable future to have, the ability to grant these licenses.¹⁰ It is this inability to award these licenses which justifies relief from the Auction No. 35 obligations. The cloud on the spectrum resulting from the ongoing NextWave litigation makes it impossible for the Commission to demand today the fulfillment of the auction winners' obligation to pay for the licenses they won.¹¹ Although the Auction No. 35 winners had notice that there were pending proceedings and litigation affecting the NextWave and Urban Comm licenses, this delay – already in excess of twenty months and with no expectation of final resolution in the near term – is well beyond any reasonable expectation. The relief sought in light of this unexpected and prolonged delay is neither inequitable nor unusual. Standard commercial agreements often contain “drop dead” provisions after which either the party has the ability to walk away from the deal without liability

¹⁰ Refund Public Notice at 1.

¹¹ The discussion of debt forgiveness in the Refund Public Notice is inappropriate. Because the Commission does not hold and cannot grant the licenses at issue here, the Commission cannot enforce the auction obligation. In the absence of a grant, no debt obligation accrues to the auction winners and therefore no debt forgiveness would be required. Therefore, either debt forgiveness is unnecessary or the Commission should clarify that, to the extent governmental action is necessary for budget purposes, it is not a taxable event for auction winners opting for relief.

to the other. The delay in the award of these licenses already exceeds the time for which reasonable commercial parties would agree to remain obligated to acquire assets.

Although the question of the status of the NextWave licenses has been presented to the United States Supreme Court, it is unlikely that the question of who holds these licenses can be finally resolved any time soon.¹² The Commission, by attempting to bind the auction winners indefinitely during this ongoing litigation, will impose an unreasonable penalty on auction winners who have complied in every respect with the Commission's rules. Because the winners are in compliance with the Commission's rules, any comparison between Auction No. 5 and Auction No. 35 is inapposite. In Auction No. 5, the Commission gave winning bidders relief from certain auction obligations because those *winners* were unable to meet the financial obligations to which they had committed in the auction. In Auction No. 35, however, it is the *Commission* that is unable to deliver spectrum to winning high bidders. The delay in awarding licenses, and not any failure on the part of the winning bidders, justifies relief. The focus of attention on changes in the marketplace rather than the status of the underlying licenses obfuscates the unique issues these auction winners face. While the economic downturn has exacerbated the impact of the delay in awarding these licenses, the delay alone justifies relief.

II. AUCTION NO. 35 HIGH BIDDERS SHOULD BE ALLOWED TO REQUEST DISMISSAL OF THEIR PENDING APPLICATIONS.

The Auction No. 35 winning bidders should have the option either to dismiss their pending long-form applications and receive a full refund of their down payments or remain committed to their contingent auction obligations and expressly reaffirm that commitment. Cook Inlet supports this approach for two primary reasons. First, the Commission has reinstated the

¹² See Mark Rockwell, *Justices Pepper FCC With Difficult Queries*, WIRELESS WEEK, October 8, 2002 (NextWave executive noting that additional appeals are possible).

licenses at issue to NextWave and therefore cannot grant the licenses to the Auction No. 35 winners.¹³ This spectrum also remains subject to ongoing litigation. Second, granting relief is in the public interest. The financial obligation to which the auction winners may be subject imposes a significant and damaging burden on auction winners, especially small businesses.

The Commission already has required a significant, ongoing financial commitment from the Auction No. 35 winners. On February 12, 2001, Cook Inlet deposited \$101,275,200 for twenty-two licenses on which it was the high bidder. Of those twenty-two licenses, twenty-one have not been granted. For over a year, the Commission held all of Cook Inlet's deposit.¹⁴ Pursuant to its Partial Refund Order, the Commission refunded a portion of the deposit, but retained \$15,092,010 of Cook Inlet's down payment. Because of its potential continuing obligation to pay for the licenses on which it bid, Cook Inlet is burdened with a contingent liability of \$503,067,000, and Cook Inlet cannot execute its current business plan and cannot pursue alternative business opportunities so long as this potential contingent obligation for these spectrum licenses remains outstanding.

The Commission should allow winners to elect to dismiss their applications because of the unprecedented and unforeseen circumstances surrounding this auction. By granting relief in this case, the Commission would not undermine the integrity of this auction or set a precedent that would be detrimental to future auctions. In fact, the Commission's decision to

¹³ See *Wireless Telecommunications Bureau Announces The Return To Active Status Of License to NextWave Personal Communications, Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation*, Public Notice, DA 01-2045 (Aug. 31, 2001). As explained above, similar relief is appropriate for the licenses formerly issued to Urban Comm. See Also Refund Public Notice at 1.

¹⁴ See *Requests for Refunds of Down payments Made in Auction 35*, FCC 02-99 (rel. Mar. 27, 2002) ("Partial Refund Order").

allow winners to dismiss their applications in this instance will bolster the credibility of its auctions because it would confirm the Commission's overall commitment to fairness in administering the auction process. Encumbering the assets of Cook Inlet and other high bidders by requiring them to remain obligated for licenses that may never be available is not in the public interest.

III. THE COMMISSION'S DEFAULT RULES DO NOT APPLY BECAUSE THE AUCTION WINNERS HAVE NOT DEFAULTED, AND NO RESTRICTIONS ON REACQUISITION SHOULD BE IMPOSED.

Allowing an auction winner to dismiss its pending application would not and should not trigger the Commission's default rules. Cook Inlet has been and will remain in compliance with the auction rules pertaining to Auction No. 35. In fact, the Commission has reviewed fully Cook Inlet's long form application and determined that Cook Inlet is a qualified licensee.¹⁵ The Commission partially granted Cook Inlet's long form application and issued a single license for which Cook Inlet was the high bidder in Auction No. 35. Cook Inlet made full payment for that single license and has been and remains prepared to make full payment for all of its outstanding licenses. Even if the Commission grants the relief from the auction obligations, Cook Inlet will remain in compliance with all applicable rules. Thus, Cook Inlet has not defaulted on any of its obligations nor has it violated any of the Commission's rules.

The fact that the winning bidders are all in compliance with the Commission's rules is what makes Auction No. 35 completely different from Auction No. 5 in which certain bidders

¹⁵ On July 27, 2001, the Commission announced that it was prepared to grant one of the twenty-two licenses on which Cook Inlet was the high bidder. *See Wireless Telecommunications Bureau Announces It Is Prepared to Grant Sixty-Two C And F Block Broadband Personal Communications Services (PCS) Licenses Upon Full And Timely Payment*, Public Notice, DA 01-1785 (July 27, 2001). On August 10, 2001, Cook Inlet submitted its full payment for this license and the Commission granted the license on August 22, 2001.

failed to meet their financial commitments. Here, Cook Inlet and other auction winners have been ready and able to pay for the licenses since the auction closed, but have been unable to do so due to the Commission's inability to grant the licenses. The penalties that applied in Auction No. 5 therefore make no sense for Auction No. 35.

Not only should the Commission's default rules not apply, but winning bidders who seek to dismiss their applications in this auction should not face future restrictions on their ability to obtain this spectrum if and when it becomes available. No winning bidder who opts to dismiss its application should be ineligible to participate in any future reauction of this spectrum or be prohibited from otherwise acquiring these licenses. Auctions are designed to ensure that spectrum is obtained by applicants who value it most.¹⁶ Banning Auction No. 35 winners from obtaining this spectrum in the future would result in market inefficiencies and would undermine this objective.

Furthermore, in auctioning spectrum licenses, the Commission is required to promote participation by small businesses in spectrum-based services.¹⁷ Imposing a financial penalty on small businesses or preventing small businesses from acquiring this spectrum in the future would likewise undermine the Commission's congressional mandate to promote small business participation. An equitable resolution by the Commission here would send a signal to potential future small business participants that the Commission's auction process is fair and reliable.

If the Commission disagrees about the applicability of its default rules to this situation, then it should waive them. The protracted litigation to which this spectrum is subject

¹⁶ See 47 U.S.C. § 309(j)

¹⁷ See 47 U.S.C. § 309(j)(B)(3).

creates unprecedented extenuating circumstances. The public interest would not be served by penalizing otherwise qualified high bidders who are prevented from paying for the licenses they won through no fault of their own. An applicant's choice to dismiss its application in these circumstances should not be prejudiced by the threat of forfeiting its down payment or suffering other penalties.

The Auction No. 35 winners already have demonstrated their commitment to the auction process by complying with the Commission's rules. It would be unfair and unwarranted to allow the auction winners to dismiss their pending applications but then subject them to a monetary or regulatory penalty.

IV. ANY SPECTRUM RETURNED TO THE COMMISSION SHOULD BE REAUCTIONED SUBJECT TO THE SAME ELIGIBILITY RULES THAT GOVERNED AUCTION NO. 35.

Depending upon the outcome of the pending litigation and this proceeding, the Commission may at some future time reauction this spectrum. If and when that time comes, the Commission should in no way diminish its commitment to small businesses. The disputed issues arising from Auction No. 35 were not caused by small business participation or the designated entity program.¹⁸ The Commission should not judge the success or failure of the designated entity program based on the unique circumstances surrounding these licenses.

Cook Inlet, as a small business applicant, is as qualified to receive and as committed to pay for the licenses on which it bid as any other applicant in the auction. At the time the auction rules were established, the Commission recognized the importance of maintaining separate blocks of spectrum for small businesses in order to meet its congressional mandate to

¹⁸ NextWave and Urban Comm participated in Auction No. 5 under the designated entity program. The issues surrounding spectrum issued to these entities arises from that auction and the installment payment plan under which NextWave and Urban Comm defaulted on their payment obligations. Installment payments, however, were not available to any Auction No. 35 bidders.

encourage small business participation. Therefore, any spectrum from this auction that is ultimately reaucted should again include certain licenses for which only small businesses are eligible. Promoting participation by designated entities will promote efficient and effective use of spectrum through the deployment of new wireless services.

* * *

For the foregoing reasons, Cook Inlet urges the Commission to adopt its proposal to allow each Auction No. 35 winner to choose whether or not to request dismissal of its pending application in its entirety. Auction winners that choose to dismiss their pending applications should not be subject to the Commission's default rules or precluded from reacquiring this spectrum. Cook Inlet also urges the Commission to remember its commitment to small businesses by ensuring that any returned spectrum is reaucted subject to the same eligibility rules that governed Auction No. 35. Cook Inlet finally urges the Commission to implement a solution expeditiously in order to reduce the burdens already imposed on Auction No. 35 winners as a result of the continuing delay in awarding this spectrum.

Respectfully submitted,

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